Petition

81-428

IN THE SUPREME COURT OF THE UNITED STATES

Office-Supreme Court, U.S.
FILED
SEP 1 1981
ALEXANDER L. STEVAS,
CLERK

October Term 1981 No. _____

ALICE SCHREIBER,

Petitioner

V.

EDWARD LIVA and PARTNERS, T/A
Ridgewood Medical Office Building,
and/or Eye Institute of New Jersey,
a Partnership,

Respondent

On Appeal from the Supreme Court of New Jersey

Petition for Certiorari

CLARE R. PETTI
Attorney for Alice Schreiber
16 Johnson Court
Paramus, New Jersey 07652
(201) 343-6912

QUESTIONS PRESENTED

1. Was the reversal by the Superior Court-Appellate Division of the State of New Jersey of the decision of the Superior Court a deprivation of property without due process of law as provided by the XIV Amendment of the Constitution of the United States of America and further, was the denial for Certification by the Supreme Court of the State of New Jersey a further deprivation of such rights?

2. Was the fact that only two Judges rather than a three-member Court of the Appellate Division, assigned to hear the appeal from the Superior Court of New Jersey a denial of the petitioner's rights?

3. Can any person or Governmental entity or body undermine or abridge the Civil Rights of any citizen of the United States?

TABLE OF CONTENTS

	Page
Questions Presented	1
Table of Contents	2
Reference to Reports of Opinions Delivered In The Courts Below	3
Statement of the Grounds on Which Jurisdiction is Sought	4
Constitutional Provisions Which This Case Involves	5
A Concise Statement of This Case	6
Arguments Amplifying Reasons Relied on for Allowance of the Writ	9
Conclusion	11
Appendix	12

REFERENCES TO REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

1. Edward Liva and Partners, et al T/A Eye Institute of New Jersey, v. Borough of Paramus, a municipal corporation et al.; Superior Court, N.J. L-11898-78 P.W.
2. Edward Liva and Partners, et al T/A Eye Institute of New Jersey, v. Borough of Paramus, a municipal corporation et al.; Superior Court, N.J. App. Div. A-3805-79 decided May 5, 1981.
3. Edward Liva and Partners et al T/A Eye Institute of New Jersey, v. Borough of Paramus, a municipal corporation et al.; Supreme Court, N.J. C-783.
4. Ridgewood-17 Associates Inc. v. Planning Board of the Village of Ridgewood and Mayor and Council of the Village of Ridgewood et al.; Superior Court, N.J. App. Div. A-5319 A-70-78.
5. Constitution of the United States of America, Amendment XIV, Section 1.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS SOUGHT

1. Denial of Certification by the Supreme Court of the State of New Jersey dated July 7, 1981 and entered July 9, 1981.

CONSTITUTIONAL PROVISIONS WHICH THIS CASE INVOLVES

AMENDMENT XIV

1. Citizenship rights not to be abridged by states.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws.

Emphasis by Petitioner.

A CONCISE STATEMENT OF THE CASE

The Petitioner and her husband are owners in fee simple of approximately 3 acres of property (Block 6806, Lots 2 and 3) since 1943 which was zoned for residential use at zoning inception since 1954. The property directly across the road (Block 6805, Lot 9) to the North was also similarly zoned by the municipality for the identical use. However, in 1973 when the zoning was reviewed, part of that property (approximately 5 acres) was zoned for commercial use. The current owner of the property, the respondent, in 1978 made application before the local zoning Board of Adjustment in the Borough of Paramus for the erection of an office building which application was denied because of the deleterious effect on the surrounding residential character of the neighborhood including that of this petitioner. Simultaneously to the denial by the Zoning Board of Adjustment of the Borough of Paramus for such

such request, the Borough was under State of New Jersey mandate to update its land use element of the Master Plan. The planning expert retained by the Borough to accomplish this recommended that the property of the respondent be returned to its original zone, for residential use. Upon a challenge by the respondent property owner to the Superior Court (L-11898-78) said zoning change was sustained. However, the Appellate Court reversed in a two-page decision and two-member court. This action was called "spot zoning" (A-3805-79) and the Supreme Court denied certification.

The petitioner feels that this decision and the return to the commercial zone designation of 1973 of the respondents' property deprives her of her property values, without due process. Her husband is a landscaper architect of international reputation and her gardens are of great beauty and value. She now feels these gardens and her property now have a much reduced value to her. She is being denied use of her property as intended by this zone change.

Said Federal question was not raised since the State's highest Court did not grant certification, but it is a vital question which must be settled by this Court.

ARGUMENTS AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

In addition to the violation of the property rights of this petitioner, if the zone of the respondents' property is to be commercial, there remains unsettled in the State of New Jersey two cases with similar facts and dissimilar decisions. Both cases were heard in the Bergen County Superior Court, Appellate Division. The two communities involved are adjacent to each other. In the one pertaining to this petitioner and respondent, the Appellate Division reversed the findings of the lower Court to order that the property be rezoned for commercial use.

In the other, the Appellate Court affirmed the decision of the lower Court and upheld the validity of the ordinance zoning the property in question for residential use. This decision was contained in a long detailed report and, although not published, set forth reasons for affirmance with great clarity. Ridgewood-17 Associates Inc. v. Planning Board of the Village of Ridgewood and Mayor and Council of the Village of Ridgewood et al.; Superior Court, N.J. App. Div. A-5319 A-70-78.

It, therefore, remains for this Court to decide a matter which is now in conflict.

CONCLUSION

WHEREFORE, the Petitioner prays, for the reasons set forth herein, that this Court grant the Writ as requested.

Dated: August 31, 1981

Clare R. Petti, Esq.
Attorney for Petitioner

I hereby certify that the foregoing petition presents a substantial question meriting certification, and that it is filed in good faith and not for purpose of delay.

Dated: August 31, 1981

Clare R. Petti, Esq.
Attorney for Petitioner

APPENDIX

	Page
Copy of excerpts of Boorman and Dorram, Inc. Memorandum	a(1)-a(2)
Edward Liva and Partners vs. Board of the Borough of Paramus, decision Superior Court, N.J. Appellate Div. A-3805-79	b(1)-b(5)
Edward Liva vs. Board of Adjustment of the Borough of Paramus, Supreme Court, N.J. C-783	c(1)-c(2)
Ridgewood-17 Associates Inc. vs. Planning Board of the Village of Ridgewood and Mayor and Council, Superior Court, N.J. Appellate Div. A-5319 A-70-78	d(1)-d(8)

MEMORANDUM

TO: Paramus Planning Board

FROM: Boorman and Dorram, Inc.

RE: *Possible Master Plan Revision, Ridgewood Avenue and Route 17*

DATE: February 5. 1979

EXCERPT

In favor of this change, referring to the requirement in the Municipal Land Use Law that "the zoning ordinance shall be drawn with reasonable consideration to the character of each district and its peculiar suitability for particular uses and to encourage the most appropriate use of land," single-family use would be an appropriate use. It would fit well into the adjoining residential uses on the south and west. While the site adjoins a highway ramp on the east, it is somewhat removed by the ramp and by the slope of the land from the heavy traffic on Route 17 and, in fact, is further from the highway, itself, than several other existing residential areas on Route 17 such as on the nearby Sycamore Street. On the north, the site adjoins the Cerami Pontiac agency, which is in the BG Zone; but this is partly shielded by the lower elevation of the site here in question, which also helps to shield it from the highway.

Appendix a(2)

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

A-3805-79

EDWARD LIVA and PARTNERS, trading as RIDGEWOOD MEDICAL OFFICE BUILDING and/or EYE INSTITUTE OF NEW JERSEY, a partnership,

Plaintiffs-Appellants,

v.

BOARD OF ADJUSTMENT OF THE BOROUGH OF PARAMUS, BOROUGH OF PARAMUS, a municipal corporation, and BUILDING INSPECTOR and/or CONSTRUCTION CODE OFFICIAL OF THE BOROUGH OF PARAMUS,

Defendants-Respondents.

Appendix b(1)

Argued April 6, 1981—Decided May 5, 1981.

Before Judges Allcorn and Pressler.

On appeal from Superior Court of New Jersey, Law Division, Bergen County.

Charles C. Collins, Jr., argued the cause for the appellants.

Frank J. Glock argued the cause for the respondent Paramus Board of Adjustment.

Joseph S. DiMaria argued the cause for the remaining municipal respondents.

Clare R. Petti filed a brief on behalf of the intervenor-respondent, Alice Schreiber.

PER CURIAM

As a result of a review of the entire record in this matter, it is plain that the ordinance amendment adopted by the governing body of Paramus on February 22, 1979 which changed the p.q. (Lot 9, Block 6805) from a predominantly BIL zone (limited commercial and industrial) to R-100 (single-family residential zone), is nothing more nor less than blatant spot zoning. This is evident alone (1) from the situs of the p.q., bordering as it does on a jug handle running off of the westerly boundary of N.J. State Highway No. 17, at its intersection with Ridgewood Avenue; (2) the commercial strip zoning and the prevalence of commercial and similar uses generally along the westerly boundary of Route

17, and (3) the removal of Lot 9 from that strip zone and its rezoning to single-family use by ordinance introduced little more than two months following the commencement by plaintiffs of the present suit initially challenging denial of certain exceptions and variances sought in connection with the use of Lot 9 and Lot 7 adjoining.

The conclusion is reinforced by the action of the Planning Board in disapproving the amendment when it was proposed and referred by the governing body pursuant to *N.J.S.A.* 40:55D-26, 64. Indeed, prior to the litigation even the municipal planning consultant recommended that such an amendment be not adopted. It should be noted also that the amendment runs counter to the then existing master plan. *N.J.S.A.* 40:55D-62.

If, in the face of the foregoing any doubt were to remain, it is at once dispelled by the comment of counsel for the municipality made during the course of oral argument, to the effect that had not the owners by variance and exception application sought to utilize such an extensive portion of the property for the desired use, the ordinance amendment as to Lot 9 most likely would not have been adopted.

In sum, that portion of the amendatory ordinance rezoning Lot 9 of Block 6805 from a BIL zone to an R-100 zone is clearly invalid as an arbitrary and capricious enactment having no rational or reasonable relation to the legitimate zoning interests or the comprehensive zone plan and scheme of Paramus, and adopted without regard thereto.

Accordingly, the judgment of the Law Division is reversed and such portion of Ordinance No. 79-2 as rezones Lot 9 of Block 6805 from a BIL zone to an R-100 zone, is set aside as invalid.

18,592

SUPREME COURT OF NEW JERSEY

SEPTEMBER TERM

C-783 1980

EDWARD LIVA, etc., :
Plaintiff-Respondent, :
vs. :
BOARD OF :
ADJUSTMENT OF :
THE BOROUGH OF :
PARAMUS, et al, :
Defendants, :
and :
ALICE SCHREIBER, : ON PETITION FOR
Intervenor-Petitioner. : CERTIFICATION

Appendix c(1)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3805-79 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 7th day of July, 1981.

Clerk

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

A-5319-77

A-70-78

RIDGEWOOD-17 ASSOCIATES, INC.,

a New Jersey Corporation,

Plaintiff-Respondent

and Cross-Appellant,

v.

PLANNING BOARD OF THE VILLAGE OF RIDGEWOOD and MAYOR AND COUNCIL OF THE VILLAGE OF RIDGEWOOD,

Defendants-Appellants

and Cross-Respondents

Appendix d(1)

CHARLOTTE F. WARD,

Plaintiff-Respondent

and Cross-Appellant,

v.

VILLAGE OF RIDGEWOOD,

a Municipal Corporation,

and MAYOR AND COUNCIL OF THE

VILLAGE OF RIDGEWOOD,

Defendants-Appellants

and Cross-Respondents

PANTLIN & CHANANIE DEVELOPMENT

CORPORATION,

Plaintiff-Respondent

and Cross-Appellant,

v

PLANNING BOARD OF THE VILLAGE OF RIDGEWOOD

Defendant-Appellant and Cross-Respondent

EVELYN GUIDO,

Plaintiff-Respondent and Cross-Appellant,

v.

VILLAGE OF RIDGEWOOD, a Municipal Corporation, and MAYOR AND COUNCIL OF THE VILLAGE OF RIDGEWOOD,

Defendants-Appellants and Cross-Respondents,

and

PLANNING BOARD OF THE VILLAGE OF RIDGEWOOD,

Defendant.

Argued October 23, 1979—Decided Nov. 19, 1979

Before Judges Matthews and Ard.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County.

Michael J. Dwyer argued the cause for appellant and cross-respondent Planning Board of the Village of Ridgewood (Dwyer, Dwyer & Dwyer, attorneys).

Charles C. Collins, Jr., argued the cause for appellants and cross-respondents Mayor and Council of the Village of Ridgewood and Village of Ridgewood.

Anthony Speranza argued the cause for respondent and cross-appellant Ridgewood-17 Associates, Inc.

EXCERPTS FROM RIDGEWOOD 17 ASSOCIATES IND. VS. VILLAGE OF RIDGEWOOD

SUPERIOR COURT, N.J.

APPELLATE DIVISION A-5319-77 A-70-78

"This is a zoning case. The property in question is a piece of land bordering on Route 17 in the Village of Ridgewood, officially known as Block 4704 on the municipality's tax map. Prior to 1970, the property in question was zoned for residential use. In 1970 a portion of this land was rezoned for office building use (O-B zone) by Ordinance No. 1385. The O-B zone was further expanded in 1975 by Ordinance No. 1568. The surrounding neighborhood was residential in character, and the ordinances attempted to protect the property of the local homeowners by limiting vehicular ingress and egress to the office zone from State Highway 17."

* * * *

Appendix d(5)

"Concurrent with the consideration of the Pantlin site plan application, the Planning Board began consideration of a proposal to rezone Block 4704 to single-family residential. After a series of public hearings, the Planning Board passed a resolution recommending that the Mayor and Council rezone Block 4704 as residential. This resolution was passed at the same meeting in which the Planning Board denied the Pantlin site plan application."

* * * *

"On September 20, 1977, the Planning Board considered and passed a resolution recommending the passage of Ordinance No. 1651 which would return Block 4704 to the one-family residential zoning that existed prior to 1970. The vote on this resolution abolishing the O-B zone was contrary to the recommendation of at least three planning consultants, one, Robert Catlin, of whom was hired by the Planning Board. All three consultants stressed that the property bordering Route 17

was not suitable for residential development due to the traffic volume and noise on the highway. Notwithstanding the recommendation of the experts, the Mayor and Council adopted the ordinance after the requisite public hearing. It became effective October 31, 1977."

* * * *

"Pursuant to stipulation incorporated in the pretrial order, the matter was presented to the trial court on the record below. No additional proof was adduced before the trial court. With respect to the rezoning of Block 4704 from office use to residential use (Determination No. 1), we affirm substantially for the reasons set forth in the letter opinion of the trial judge. The Courts have a limited scope of review in cases involving zoning ordinances. There is a strong presumption in favor of the validity of the ordinance. It cannot be invalidated by a court unless this presumption is overcome by a showing that the ordinance was arbitrary or unreasonable. The total factual setting must be evaluated in each case. If the issue is in doubt, the ordinance must be upheld."

* * * *

"The judgment of the court below upholding the validity of Ordinance No. 1651 of the Village of Ridgewood is affirmed."

Opposition

Office - Supreme Court, U.S.
FILED
SEP 30 1981
ALEXANDER L. STEVAS
CLERK

No. 81-428

In The
SUPREME COURT OF THE UNITED STATES
October Term 1981

ALICE SCHREIBER,

Petitioner,

v.

EDWARD LIVA and PARTNERS, t/a
Ridgewood Medical Office Building,
and/or Eye Institute of New Jersey,
a Partnership,

Respondents.

On Petition for Certiorari to the
Supreme Court of New Jersey

BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR CERTIORARI

Charles C. Collins, Jr.
Attorney for Respondents
135 Prospect Street
Post Office Box 728
Ridgewood, New Jersey 07451
(201) 444-4850

SERRAO ASSOCIATES, INC.
Trenton, New Jersey 08618
(609) 883-7979

TABLE OF CONTENTS

Title 1
Counterstatement of Case 2
Summary of Argument 3
Argument 3
Conclusion 7
Appendix 1a
Petitioner's Brief to the New Jersey Superior Court Appellate Division 1a
Petitioner's Brief and Petition for Certification to the New Jersey Supreme Court 8a

TABLE OF AUTHORITIES

Cases

Cardinale v. Louisiana, 394 U.S. 437, 22 L. Ed. 2d 398 (1969) (and cases cited therein) 4
Euclid v. Ambler Realty Co., 272 U.S. 365, 71 L. Ed. 303 (1926) 6
Hammerstein v. Superior Court of California, 341 U.S. 491, 95 L. Ed. 1135 (1950) 7

Rules

United States Supreme Court Rules, 17.1 7

No. 81-428

In The
SUPREME COURT OF THE UNITED STATES
October Term 1981

ALICE SCHREIBER,

Petitioner,

v.

EDWARD LIVA and PARTNERS, t/a
Ridgewood Medical Office Building,
and/or Eye Institute of New Jersey,
a Partnership,

Respondents.

On Petition for Certiorari to the
Supreme Court of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

COUNTERSTATEMENT OF THE CASE

Respondents sought to erect a professional office building on property zoned for that use in Paramus, New Jersey and situated adjoining State Route 17, a major north/south arterial highway. In addition they sought minor technical variances for non-residential use of adjoining properties owned by them which were zoned residential. After ten months of extended hearings before the Board of Adjustment, the variances were denied and Respondents filed a conforming site plan, without the need for variances. Before the Planning Board could act on same, the Governing Body rezoned the major portion of Respondents' property from light industrial to the second highest residential zone in the Borough. The rezoning was accomplished against the recommendation of the Planning Board and Planner. Respondents challenged the denial of the variances and the rezoning, and Petitioner Schreiber was permitted to intervene in the action in the trial court. The trial court's decision upheld the rezoning obviating the need to determine the variance issue. Respondents appealed and in oral argument before the New Jersey Superior Court Appellate Division indicated through counsel their intention to abandon the issue as to variances, if the rezoning ordinance were invalidated and to proceed with their conforming site plan application which they have done. There were no cross-appeals, and the Appellate Division reversed the trial court, invalidating the rezoning ordinance as illegal "spot zoning."

The petitioner filed a brief with the Appellate Division and a petition for certification to the New Jersey Supreme Court with attorneys for the municipal bodies.

At no time during the course of the proceedings did she or any other party raise any issue of deprivation of constitutional rights, whether federal or state.

The New Jersey Supreme Court denied certification.

SUMMARY OF ARGUMENT

1. The Supreme Court should not take jurisdiction over this matter as no federal question was even raised in the state courts below.

2. There are no "special and important reasons" justifying the grant of this petition.

ARGUMENT

1. The only questions offered by the Petitioner to support her petition for certiorari refer to the fourteenth amendment and an alleged denial of her property without due process of law.

At no time during the course of the proceedings below did the petitioner raise any of these issues.

She appeared throughout as an intervenor. Through her counsel she participated in the trial. She filed a brief with the Appellate Division of the Superior Court of New Jersey in opposition to the respondents' appeal (Ra 1) and she filed a petition for certification with the New Jersey Supreme Court after the decision of the Appellate Division (Ra 8). Nowhere in any of these papers is there the slighest hint of any constitutional issue, whether federal or state, nor is there any other federal claim raised.

Indeed, in her petition for certification to the New Jersey Supreme Court, *after* the decision in respondents' favor by a two judge panel, she chose not to raise any objection to the composition of that court.

It is settled law that this Court will not entertain a federal consitutional question when raised for the first time on review of a state court decision. *Cardinale v. Louisiana* 394 U.S. 437, 438, 22 L. Ed. 2d 398, 400 (1969). As Mr. Justice White stated in the *Cardinale* case:

> "Although certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell v. Randell,* 10 Pet 368, 9 L Ed 458 (1836), Justice Story reviewed the earlier cases commencing with *Owings v Norwood's Lessee,* 5 Cranch 344, 3 L Ed 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c 20, §25, 1 Stat 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet 368, 391, 9 L Ed 458, 467. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the *Crowell* opinion, *Miller v. Nicholls,* 4 Wheat 311, 315, 4 L Ed 578, 579 (1819), and since, e.g. *Safeway Stores, Inc. v Oklahoma Retail Grocers Assn., Inc.,* 360 US 334, 342, n. 7, 3 L Ed 2d 1280, 1286, 79 S Ct 1196 (1959); *State Farm Mutual Automobile Ins. Co. v Duel,* 324 US 154, 160-163, 89 L Ed 812, 817-819, 65 S Ct 573 (1945); *McGoldrick v Compagnie Generale Transatlantique,* 309 US 430, 434-435, 84 L Ed 849, 851-852, 60 S Ct 670 (1940); *Whitney v California,* 274 US 357, 362-363, 71 L Ed 1095, 1100-1101, 47 S Ct 641 (1927); *Dewey v Des Moines,* 173 US 193, 197-201, 43 L Ed 665, 667-668, 19 S Ct 379 (1899); *Murdock v City of Memphis,* 20 Wall 590, 22 L Ed 429 (1875).

> In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 USC § 1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground."

2. If one looks closely at the Petitioner's complaint, it becomes evident that she is really mounting a belated challenge to the original zone which existing for respondents' property for six years and which the New Jersey courts restored. By her own statement it is made clear that the zone was created in 1973 and continued for a six year period during which time the regulations permitting the respondents' project were either never challenged by petitioner or challenged unsuccessfully.

Petitioner should not be permitted at this time to attack indirectly the zone she tolerated for the prior years.

Zoning regulations are a part of our lives. This has been established since 1926 when this Court, speaking through Mr. Justice Sutherland said:

> "Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even a half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise," *Euclid v. Ambler Realty Co.* 272 U.S. 365, 385-386, 71 L. Ed. 303, (1926).

The writ of certiorari is discretionary, *Hammerstein v. Superior Court of California* 341 U.S. 491, 492, 95 L. Ed. 1135, 1137 (1950), and only granted for reasons that are "special and important." Sup. Ct. R. 17.1. It is submitted that such is not the case with this petitioner's application.

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

/s/ Charles C. Collins, Jr.

Charles C. Collins, Jr.
Attorney for Respondents

— APPENDIX —

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-3805-79

EDWARD LIVA AND PARTNERS, T/A RIDGEWOOD MEDICAL OFFICE BUILDING AND/OR EYE INSTITUTE OF NEW JERSEY a partnership,

Plaintiffs-Appellants,

vs.

BOARD OF ADJUSTMENT OF THE BOROUGH OF PARAMUS, BOROUGH OF PARAMUS, A MUNICIPAL CORPORATION AND BUILDING INSPECTOR AND/OR CONSTRUCTION CODE OFFICIAL OF THE BOROUGH OF PARAMUS,

Defendants-Respondents.

CIVIL ACTION:
ON APPEAL FROM THE FINAL JUDGMENT
OF THE SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-BERGEN COUNTY
ENTERED ON MARCH 10, 1980
SAT BELOW: HONORABLE HARVEY SMITH, J.S.C.

BRIEF ON BEHALF OF ALICE SCHREIBER, OBJECTOR, DEFENDANT-RESPONDENT

CLARE R. PETTI, ESQ.
Attorney for
Objector, Defendant-Respondent
16 Johnson Court
Paramus, N.J. 07652
(201) 343-6912

TABLE OF CONTENTS

	Page
Statement of Facts	1
Argument:	
Point I — The action of the governing body rezoning Plaintiff's property is not "spot zoning"	3
Conclusion	7
Cases Cited:	
Barone v. Bridgewater Township 45 N.J. 224 (1965)	4
Bow and Arrow Manor v. Town of West Orange 63 N.J. 335 (1973)	5
Hyland v. Mayor and Township Committee of Township of Morris 130 N.J. Super. 470	4,6
Johnson v. Township of Montville 109 N.J. Super. 511 at 519 (1970)	6
Kirsch Holding Co. v. Borough of Manasquan 111 N.J. Super. 359, Reversed on other grounds, 59 N.J. 241 at page 251	4
Morris v. Posma, 41 N.J. 354 (1964)	5,6
Ridgewood - 17 Associates Inc. v. Planning Board of the Village of Ridgewood and Mayor and Council of the Village of Ridgewood et al.; A-5319 A-70-78 (1978) Super. Court, N.J. App. Div.	6
Vickers v. Township Com. of Gloucester Township 37 N.J. 232 (1962)	4,5,6
New Jersey Constitution, Article IV	4

STATEMENTS OF FACTS

Plaintiff owns the property which is the subject of this appeal. Property is known as Lots 7 and 9, in Block 6805 on the tax assessment map of the Borough of Paramus and consists of approximately 4.80 acres. Plaintiff's application for a building permit to erect an office building was denied because the area was zoned partially for residential use and partially for commercial use.

This denial was appealed to the Board of Adjustment of the Borough of Paramus and public hearings were held on March 20, April 29, May 4, May 18, June 5, July 6, July 24, August 24, September 21 and October 18, 1978.

After hearing the evidence of the applicant and the objectors, the Board of Adjustment denied the variance on the grounds that Plaintiff did not meet the statutory requirements as set forth for a use variance both as to special reasons and the negative criteria.

Plaintiff contends that this decision on the part of the Board of Adjustment was arbitrary and capricious.

Thereafter the Mayor and Council, since at this time it was simultaneously recommending changes and updating the Master Plan as required by statute, rezoned the entire acreage for residential use. Plaintiff attacks the constitutionality of Ordinance No. 79-2 adopted February 2, 1979 although this in fact was recommended along with other changes in the land use element of the Master Plan.

Upon an appeal taken by Plaintiff to the Superior Court as to the action of the Mayor and Council on the rezoning of Plaintiff's property, the Court upheld the action of the Mayor and Council and Ordinance No. 79-2 which rezoned the subject property.

The denial of the variance by the Board of Adjustment was therefore, not argued before the Court and became academic and not considered by the Court.

Plaintiff hereby appeals the findings and decision of the Superior Court.

POINT I

THE ACTION OF THE GOVERNING BODY REZONING PLAINTIFF'S PROPERTY IS NOT "SPOT ZONING"

The property in question had been originally zoned for residential use when it was changed in 1973 to the residential and commercial use under which applicant made its application before the Board of Adjustment. This property was rezoned in 1979 by Ordinance 79-2 for residential use. This ordinance is the subject of the appeal.

The change was brought about when under "The Municipal Land Use Law" the Borough of Paramus was reviewing and updating its Master Plan and companion zoning ordinance. Said land use element of the Master Plan dated January 1, 1979 and amended January 16, 1979, was adopted by the Borough of Paramus Planning Board with recommendations that the Mayor and Council adopt it. However, the Mayor and Council gave further consideration to the ordinance under consideration and further amended the Master Plan ordinance. This last change and amendment the Planning Board disapproved.

Nonetheless, after extensive review, discussions and a public hearing the ordinance was passed on final hearing February 22, 1979. The planning consultants Boorman and Dorram Inc. hired by the Borough for the purpose of the updating of the Master Plan had given both the Planning Board and the Mayor and Council the benefit of their expertise. The rezoning of Block 6805, Lot 9 from B.I.L. use to residential use was a valid exercise of power by the defendant, Mayor and Council of the Borough of Paramus as conferred by Statute.

The New Jersey Constitution Article IV, Section VI, Par. 2, grants the Legislature power to enact zoning legislation. N.J.S.A. 40:55D-62 gives the municipalities authority to enact zoning legislation. Such regulations shall be in accordance with a comprehensive plan "The regulation must be reasonably calculated to meet the evil and not exceed the public need or substantially affect uses which do not have the offensive character of those which cause the problems sought to be ameliorated. *Kirsch Holding Co. Vs Borough of Manasquan,* 59 N.J. at 251.

The party attacking the validity of a zoning ordinance has a heavy burden of affirmatively showing it bears no reasonable relationship to public health, morals, safety or welfare proof of unreasonableness must be beyond debate. *Barone Vs Bridgewater Township* 45 N.J. 224, 226 (1965); *Vickers vs Township Committee of Gloucester Township* 37 N.J. at 242 (1962).

The facts in *Hyland vs Mayor and Township Committee of Township of Morris* 130 N.J. Super 470 are similar to those in question in this instant matter before the Court. In the above the ordinance for zone change, was also passed though the Planning Board disapproved the ordinance. However, the Court states that when the legislative judgment is at least debatably reasonable and valid, the ordinance must be sustained. *Hyland vs Mayor and Township Committee of Township of Morris,* Supra 130 N.J. Super. at 470; *Bow and Arrow Manor Vs Town of West Orange* 63 N.J. 335 (1973); *Vickers vs Township Committee of Gloucester,* Supra, 37 N.J. 232.

> "We are not concerned with the wisdom or lack of wisdom of the particular amendment. The inquiry is whether or not it is within the scope of proper zoning regulation, and whether it is arbitrary or unreasonable" *Morris vs Posma,* Supra 41 N.J. 354-361 (1964).

Problems created by traffic congestion may be considered when designing a zoning ordinance — N.J.S.A. 40 55D-2(h). Therefore, it was within the province of the Mayor and Council of Paramus to consider the existing traffic congestion and the impact that further commercial development would have as to traffic on the residential community immediately to the West and South of the subject site. The traffic signalization discussed that would be necessary to improve the traffic congestion at this site had not been constructed nor were there any immediate plans to do so. Office construction in this Borough is continuing at such a rapid rate in areas properly zoned for such use that there is no present deficiency of office space. This property can properly be used for residential use.

Courts have a limited scope of review n cases involving zoning ordinances. There is a strong presumption in favor of the validity of the ordinance. It cannot be invalidated by a Court unless this presumption is overcome by a showing that the ordinance was arbitrary or unreasonable. *Ridgewood—17 Associates Inc. vs Planning Board of the Village of Ridgewood and Mayor and Council of the Village of Ridgewood et al.;* an unreported decision of the Appellate Division, A-5319 A-70-78 (1978) Superior Court, New Jersey, Appellate Division; citing *Morris vs Posma* Supra, 41 N.J. 354 (1964).

Trial Judge Byrne found "that the Plaintiff's land was not zoned into idleness. While an office may be more profitable, the tract can be developed into one family houses". *Hyland vs Mayor and Township Committee of Morris,* Supra, 130 N.J. Super. 470 at 481.

In *Johnson vs Township of Montville* 109 N.J. Super. 511 at 519 (1970), the Court stated "We may not pass on upon the wisdom of a particular ordinance and debatable issues or questions of policy involved in its passage must be resolved in favor of the municipality, citing *Vickers vs Township Committee of Gloucester Township* Supra, 37 N.J. 232 (1962).

There was no spot or improper zoning when ordinance 79-2 was passed since consideration was given to the facts estab-

lished by Mr. Boorman, the municipal planner, that this change would not zone property into disutility; and that it could be developed residentially (T 2/25/80 P. 59).

CONCLUSION

This memorandum will not address itself to the findings by the Zoning Board of Adjustment in as much as this was never heard by the Court and no decision was rendered. It is academic as to what the Board of Adjustment did.

The brief of behalf of the objector resident Alice Schreiber is not as detailed as learned counsel Joseph DiMaria attorney for the Borough of Paramus and Frank Glock attorney for the Board of Adjustment have submitted. It has also been an accepted fact that the resources of the objecting resident are very limited. In the Superior Court permission was granted by Judge Harvey Smith that although I had represented Mrs. Schreiber through all the lengthy Board of Adjustment hearings, I would be permitted to submit to the Court my exhibits and cross-examine all the witnesses, but could rely on the trial briefs submitted by Mr. DiMaria and Mr. Glock. The briefs submitted to the Appellate Division by both the distinguished counsel have been reviewed by me and I concur in all details. It is unreasonable to burden the court with a repetition of the same facts, and the long list of cases already cited so many times. I therefore, respectfully submit this brief as a supplement to those submitted.

Respectfully Submitted,

By /s/ Clare R. Petti, Esq.
Clare R. Petti, Esq.
Attorney for Alice Schreiber,
Objector, Defendant,
Respondent

SUPREME COURT OF NEW JERSEY

DOCKET NO.

EDWARD LIVA AND PARTNERS, T/A RIDGEWOOD MEDICAL OFFICE BUILDING AND/OR EYE INSTITUTE OF NEW JERSEY A PARTNERSHIP,

Plaintiff-Appellant.

v

BOARD OF ADJUSTMENT OF THE BOROUGH OF PARAMUS, BOROUGH OF PARAMUS, A MUNICIPAL CORPORATION AND BUILDING INSPECTOR AND/OR CONSTRUCTION CODE OFFICIAL OF THE BOROUGH OF PARAMUS,

Defendants-Respondents.

CIVIL ACTION:
PETITION FOR CERTIFICATION TO THE SUPERIOR COURT — APPELLATE DIVISION
SAT BELOW: HON. SYLVIA B. PRESSLER, J.S.C.
HON. SAMUEL ALLCORN, JR., J.S.C.

BRIEF AND APPENDIX FOR OBJECTOR-DEFENDANT-RESPONDENT, ALICE SCHREIBER

CLARE R. PETTI, ESQ.
16 JOHNSON COURT
PARAMUS, N.J. 07652
ATTORNEY FOR OBJECTOR, DEFENDANT-RESPONDENT, ALICE SCHREIBER

TABLE OF CONTENTS

	PAGE
TABLE OF APPENDICES	II
TABLE OF CASES CITED	III
STATEMENT OF MATTER INVOLVED	1
QUESTIONS PRESENTED	2
ERRORS COMPLAINED OF	3
REASONS AND BASIS UPON WHICH IT IS CONTENDED THAT CERTIFICATION SHOULD BE GRANTED	4
ARGUMENT	5
CONCLUSION	6

TABLE OF APPENDICES

	APPENDEX
Decision of the Appellate Division of the State of New Jersey Dated: November 19, 1979	"A"
Decision of the Appellate Division of the State of New Jersey Dated: May 5, 1981	"B"
Decision of the Superior Court of New Jersey Dated: February 26, 1980	"C"
Judgment of the Superior Court of New Jersey Dated: March 10, 1980	"D"

TABLE OF CASES CITED

	PAGE
RIDGEWOOD-17 ASSOCIATES, INC. V. *PLANNING BOARD OF THE VILLAGE OF RIDGEWOOD* et al A-70-78	4

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF NEW JERSEY:

OBJECTOR, DEFENDANT-RESPONDENT, ALICE SCHREIBER, of the Borough of Paramus, Bergen County, New Jersey, Respectfully Shows:

STATEMENT OF MATTER INVOLVED:

The Plaintiff, Dr. Edward Liva and Partners, have challenged the rezoning of part of the property located off Route 17, at Ridgewood Avenue. Said property was rezoned by the Borough of Paramus by its Ordinance No. 79-2. Property is located primarily in a residential area directly across the street from the Objector. This property was rezoned commercially when the zoning ordinance of the Borough was updated only in 1973. It was found to be unsatisfactory and then when the municipal land use law was being updated for the Master Plan as currently required, the zoning was changed back to residential as part of its comprehensive plan.

Plaintiff had acquired the property in order to erect a medical office building at the same time that this rezoning took place.

QUESTIONS PRESENTED

1. Was the rezoning of Plaintiff's property arbitrary or so called "Spot" zoning?

ERRORS COMPLAINED OF

1. The reversal by the Appellate Division of the decision of the Trial Court were not on facts on the record as presented on the Court below.

2. The conclusion reached by the Appellate Division that Ordinance 79-2 of the Borough of Paramus could not be "Spot" zoning since the record can not infer this conclusion.

REASON AND BASIS UPON WHICH IT IS CONTENDED THAT CERTIFICATION SHOULD BE GRANTED

In addition to this particular matter having been decided by the Appellate Division of the Superior Court, there was another matter heard and decided by the Superior Court of New Jersey, Appellate Division. Said decision was also not a published opinion. *Ridgewood-17 Associates, Inc.*, V. *Planning Board of the Village of Ridgewood* et al A-70-78. This decision is included in this petition since the facts are similar and the judgment in this instant matter did uphold the validity of the zoning ordinance of the Village of Ridgewood, which had rezoned the property in question to residential use.

ARGUMENT

It is our feeling that two matters with similar facts have both been heard by a Court of equal jurisdiction with opposite conclusions. In our opinion, the Supreme Court being the highest Court of appeal in the State of New Jersey should review the current matter so that an opinion might be rendered.

CONCLUSION

WHEREFORE, the Objector Defendant-Respondent, for the reasons set forth herein, that this Court grant Certification.

Dated: May 27, 1981

/s/ Clare R. Petti, Esq.

CLARE R. PETTI, ESQ.
Attorney for Objector Defendent-Respondent

I hereby certify that the foregoing Petition presents a substantial question meriting Certification, and that it is filed in good faith and not for purposes of delay.

Dated: May 27, 1981

/s/ Clare R. Petti, Esq.

CLARE R. PETTI, ESQ.
Attorney for Objector Defendent-Respondent